United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1437

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To be argued by
WILLIAM I. ARONWALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1437

UNITED STATES OF AMERICA,
Appellant,

—v.—

HARRY KURZER,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

OTHER AUTHORITIES CITED

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America appeals from an order entered on September 8, 1975, in the United States District Court for the Southern District of New York by the Honorable Morris E. Lasker, United States District Judge, granting a motion by the defendant Harry Kurzer to dismiss the indictment as to him and from an order of Judge Lasker entered on November 12, 1975, adhering to his order of dismissal on rehearing.

Indictment 74 Cr. 288, filed March 21, 1974, charged Harry Kurzer, Peter Pfeiffer and Northern Boneless Meat Corporation in three counts with aiding and abetting in the filing of false and fraudulent federal corporate income tax returns, in violation of Title 26, United States Code, Section 7206(2).

On May 24, 1974, Harry Kurzer filed a motion to dismiss the indictment on the ground that the Government

had procured it by use of testimony given by Kurzer under a grant of immunity under 18 U.S.C. § 6003. After an evidentiary hearing on February 6 and 7, 1975, Judge Lasker on September 8, 1975, dismissed the indictment, finding that the Government had failed to demonstrate that it did not use Kurzer's immunized testimony in obtaining the indictment.

On September 17, 1975, the Government filed a motion for reargument and reconsideration of the order dismissing the indictment. After an evidentiary hearing on November 5, 1975, Judge Lasker, on November 12, 1975, granted the motion for reconsideration and adhered to his view that the indictment must be dismissed.

Statement of Facts

A. The First Hearing

In March, 1971, the New York County District Attorney's Office began an investigation of the meat industry under the direction of Assistant District Attorney Franklyn H. Snitow. In July or August, 1971, believing that the investigation would disclose federal as well as state violations, the District Attorney's office invited the Justice Department's Joint Strike Force Against Organized Crime and Racketeering for the Southern District of New York to participate in the investigation.* (Tr. 9-10, 71-73, 79-82, 257).**

In January, 1972, upon learning that Harry Kurzer was the accountant for Transworld Fabricators (Trans-

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* In August, 1973 the investigation ceased to be a joint one between the federal and state authorities. (Tr. 81).

** "Tr." refers to the minutes of the February 6 and 7, 1975 evidentiary hearing.

world), a corporation in which Moe Steinman * was believed to be associated, Assistant District Attorney Snitow contacted Kurzer in an effort to obtain certain of Transworld's books and records. (Tr. 11, 42). On January 7, 1972, Kurzer met with Assistant District Attorney Snitow and detectives assigned to the investigation and discussed the status of Transworld's books and records ** and Kurzer's duties as accountant for Transworld. During this meeting there was no conversation at all regarding Peter Pfeiffer, Northern Boneless Meat Corporation, the relationship between Moe Steinman and Pfeiffer or Northern Boneless Meat Corporation, nor was there any discussion regarding G & M Packing Corporation, Ben Moskowitz, or the nature and existence of any relationship between G & M Packing Corporation and Ben Moskowitz on the one hand and Pfeiffer and Northern Boneless Meat Corporation on the other. (Tr. 11-18, 26).***

On or about January 28, 1972, a second meeting occurred between Kurzer and Assistant District Attorney Snitow. Also present were detectives assigned to the investigation and Kurzer's attorney, Neal J. Hurwitz, Esq. At this meeting Detective Nicholson specifically sought information from Kurzer as to the removal of cash by Steinman from Transworld by means of false invoices for distribution to union officials and others. Kurzer furnished

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* Moe Steinman was the target of the investigation at this point. (Tr. 22).

** Earlier, detectives armed with a search warrant had gone to the offices of Transworld to seize its books and records, only to find that they had been destroyed under suspicious circumstances. (Tr. 11).

*** Indictment 74 Cr. 288 involves a scheme whereby the defendants, by virtue of a phony invoice arrangement, aided in the filing of false and fraudulent corporate income tax returns by Transworld Fabricators, Inc. and G & M Packing Corporation.

no information about such occurrences. (Tr. 49-50, 85-87).*

On April 18, 1972 another meeting occurred between Kurzer, Assistant District Attorney Snitow and Kurzer's attorney, Neal J. Hurwitz. The subject matter of this meeting was limited to a matter wholly unrelated to the facts and transactions upon which the indictment at bar is predicated.**

During the course of these meetings Mr. Snitow advised Kurzer that the District Attorney's office was interested in obtaining his cooperation as to the investigation into Steinman's activities and that the District Attorney's Office would be willing to grant him immunity in exchange for his cooperation. However, Kurzer denied having knowledge of any type of scheme by which Moe Steinman either inflated the price of meat or obtained cash in order to pay off union and supermarket officials. (Tr. 85-87).*** The only information furnished by Kurzer which was relayed to the Strike Force by the District Attorney's Office was that Kurzer could furnish no information concerning the destruction of Transworld's books. (Tr. 85-86).

By the summer of 1972 the federal aspect of the joint investigation began to focus on quarterly employers' tax returns which had been filed by certain of the corporations controlled by Moe Steinman. These corporations had listed persons, including relatives of Steinman, as being

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* Also, Kurzer was asked questions regarding the destruction of certain of Transworld's books and records which had occurred in December, 1971. (Tr. 51-52).

** The subject discussed concerned the relationship between one Herbert Newman and one Charles Anselmo. (Tr. 21, 24-29).

*** Notes of these interviews, prepared by either Mr. Snitow or the detectives, were not turned over to the federal investigating authorities until sometime after the instant indictment was filed. (Tr. 38-40, 82-85, 88-91; GX 4 & 5).

employees, whereas the investigation had disclosed evidence establishing that they were not, in fact, employees. Since it was known from the returns that Kurzer had been the preparer of some of the tax returns he was contacted by the federal authorities in the Summer of 1972. At or about this time Mr. Hurwitz contacted Department of Justice Special Attorney William I. Aronwald, who was in charge of the federal investigation, and inquired what the federal interest was in Mr. Kurzer. (Tr. 257-58).

Mr. Aronwald advised Mr. Hurwitz that the target of the investigation was Moe Steinman and that Kurzer was viewed only as a possible witness and not as a target of the investigation. Mr. Hurwitz was further advised that the Federal Government would be willing to grant use immunity to Kurzer but that before any final decision could be made it would be necessary to interview and debrief Kurzer so that a determination could be made as to whether he was being truthful. (Tr. 258-59, 294-95). An agreement was reached between Messrs. Hurwitz and Aronwald which provided that Kurzer would be produced and interviewed by agents from the Internal Revenue Service. It was further agreed that Mr. Hurwitz would be present during these interviews, and that if, upon conclusion of the interviews, the federal authorities were satisfied that he was being cooperative and truthful, then he would formally receive use immunity and would testify before a federal grand jury. However, if upon the conclusion of the interviews, it was determined that he was not being truthful or cooperative then he would not formally receive immunity and would not be asked to testify before the grand jury. (Tr. 259-60). In such event it was agreed that what Kurzer might say during the course of the interviews would not be used against him. (Tr. 136-38, 259-60).

On August 17, 1972, Kurzer and Mr. Hurwitz appeared at the Strike Force's offices for the initial inter-

view, which was conducted by agents of the Internal Revenue Service. There was no discussion at all, and Kurzer did not provide any information whatsoever, with respect to any of the facts and circumstances pertaining to the scheme to which the instant indictment relates. (Tr. 195-98, 262).

Thereafter there occurred several other debriefing and interview sessions with Kurzer, conducted by agents of the Internal Revenue Service in the presence of his counsel. (Tr. 106-07). Despite the fact that Kurzer was questioned as to his knowledge of any schemes whereby Moe Steinman was generating cash from Transworld by using fraudulent invoices, Kurzer provided no information regarding such a scheme. (Tr. 148, 150-51, 164, 176, 191, 244-49, 264-66, 270-73; GX 6).*

Having no reason at that time to disbelieve anything that Kurzer had said during the debriefing sessions he was asked to, and did, appear before a federal grand jury on February 26, 1973. At the time of his grand jury appearance Mr. Kurzer was formally granted testimonial immunity. (Tr. 263; GX 1). His testimony related only to questionable business expense deductions by Steinman and to payroll falsification by Steinman in fraudulently claiming that salaries had been paid to persons in fact not employed by his companies.

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* GX 6 is a memorandum of interview prepared by agents of the Internal Revenue Service which pertains to interviews of Kurzer conducted on December 1 and 13, 1972. This memorandum sets forth all of the information provided by Kurzer to the Government with respect to any matter having income tax ramifications. (Tr. 171-73, 202-07, 217).

Even Mr. Hurwitz who testified on his client's behalf, had no recollection of Kurzer providing any information whatsoever regarding the phony invoice scheme allegedly participated in by the defendants, Transworld and G & M. Nor did he have any recollection of Kurzer having provided any information concerning his knowledge of any scheme in which cash was generated by Moe Steinman through the device of phony invoices. (Tr. 292-93, 297-98, 302-09).

On June 4 and 5, 1973, Special Agents of the Internal Revenue Service met with Kurzer at his home. During these meetings he was specifically asked whether he had knowledge of any scheme whereby Moe Steinman, his relatives and their corporations were diverting corporate funds. In addition, he was asked whether he had knowledge of any scheme in which phony invoices were used. On both occasions Kurzer stated that he had no such knowledge. (Tr. 121, 179-81, 185-91; GX 7).

In March, 1973 two federal indictments were returned in the Southern District of New York against Moe Steinman and others.* In early August, 1973, an agreement was reached whereby the Government was able to obtain the cooperation of Moe Steinman. Accordingly, in mid-August, 1973, the Strike Force team began debriefing Steinman and as a result of the debriefing sessions, the Government learned for the first time of the facts upon which Kurzer's indictment is based. (Tr. 122-24, 192, 269-70). It was as a result of this evidence, and not as a result of any information provided by Kurzer, that Kurzer was indicted in March, 1974. (Tr. 270-71).

On September 8, 1975, Judge Lasker, in a written opinion, granted Kurzer's motion to dismiss the indictment. Judge Lasker found that Kurzer had not provided any information about the subject matter of the present indictment. However, Judge Lasker, in dismissing the indictment, held as follows:

> "(1) the government has failed to establish that it had information implicating Kurzer prior to

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* Indictments 73 Cr. 215 and 73 Cr. 216. The latter indictment related to the employers' quarterly income tax return concerning which Kurzer had been questioned before the grand jury. There is no dispute over the fact that Kurzer's grand jury testimony was used in connection with this indictment. (Tr. 284). In addition, two state indictments were returned, one of which named Moe Steinman as a defendant. (Tr. 83, 92). Kurzer never appeared before the State grand jury. (Tr. 19).

granting him immunity; (2) it is undisputed that Steinman's indictment was influenced at least in part by Kurzer's statements or testimony; (3) information provided by Steinman led to the indictment of Kurzer; and (4) the government has failed to establish that Steinman would have furnished such information absent his own indictment or the pressure brought upon him by the Government which was caused at least in part by Kurzer's statements or testimony."

B. The Second Hearing on the Government's Motion for Reargument.

The Government moved for reargument. At the hearing on reargument, it was established that Elkan Abramowitz, Esq., was retained by Moe Steinman in January, 1972 in connection with the investigation being conducted by the federal and state authorities.* (Tr. 5-7, 83-84).** In March, 1973, after the filing of federal and state indictments against Steinman a meeting occurred between Mr. Abramowitz, Special Attorney Aronwald and agents of the Internal Revenue Service.*** During this meeting Special Attorney Aronwald inquired whether Steinman would be willing to cooperate with the Government. Mr. Abramowitz indicated that, in view of his prior conversations with Steinman, he did not believe that Steinman would cooperate on the basis of the indictments

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* At the time Abramowitz was retained it was his belief and Steinman's that only the District Attorney's Office was involved in the investigation. It was not until the Summer of 1972 that he learned of the federal interest in the investigation. (Tr. 5-7, 84).

** References to Tr. in this section of the brief refer to the transcript of the November 5, 1975 hearing on the motion for reargument.

*** The purpose of this meeting was to provide Mr. Abramowitz with copies of the federal indictments, and to preliminarily discuss matters of discovery. (Tr. 10-11).

that had been filed. Mr. Abramowitz agreed, however, to take the matter up with his client, and when he did, he advised Steinman of the Government's interest in obtaining his cooperation and of the advantages to be derived by Steinman in the event he did cooperate. According to Mr. Abramowitz, Steinman rejected the idea of cooperation because both he and Mr. Abramowitz felt that there were valid defenses to both federal indictments and Steinman was confident that he would be acquitted. Mr. Abramowitz reported back to Special Attorney Aronwald that Steinman was not interested in cooperating. (Tr. 10-12, 17-18, 28, 53-55, 88-89). When Mr. Abramowitz relayed to the federal authorities Steinman's decision not to cooperate, he was advised by Mr. Aronwald and IRS Special Agent Marvin Sontag that the investigation was going to be continued and that they believed that there was much more to Steinman's illegal activities than was reflected in the March, 1973 indictments. Mr. Abramowitz suggested that, if and when such additional evidence was obtained, he be advised so that he could take up the matter of cooperation with Steinman again. (Tr. 12, 55, 75).*

In July, 1973, Moe Steinman learned that the Government's continuing investigation had disclosed evidence of cash transactions between Steinman and persons in the meat industry.** At this point Steinman instructed Mr. Abramowitz to advise Special Attorney Aronwald that

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* Even prior to the filing of the March, 1973 indictments, efforts to obtain Steinman's cooperation had proven unsuccessful. (Tr. 27-28).

** This evidence was uncovered by an investigation involving questioning of all companies doing business with any of Steinman's companies. (Tr. 64-65). Steinman heard almost immediately through his brother Sol that several companies doing business with Transworld had revealed to the Government that large amounts of cash were being generated by fraudulent invoices billing Transworld for nonexistent meat purchases. (Tr. 89-94).

he was willing to cooperate. (Tr. 13-16, 64-65). Steinman's decision to cooperate was based upon his view that he had no defense to the charges likely to flow from such new evidence and thus, in contrast to the March, 1973 indictments, he expressed to his attorney an unwillingness to stand trial on these prospective charges. (Tr. 16-17, 18-19, 89-95).

In July, 1973 negotiations began between the Government and Mr. Abramowitz which culminated with a written agreement, dated August 14, 1973, in which Steinman agreed to cooperate with the federal and state authorities and to plead guilty to an information charging a violation of 26 U.S.C. Section 7206(1). (Tr. 19-20, 29-31, 55-57, 71-72, 75; GX 1.) Neither Moe Steinman nor Mr. Abramowitz was aware that Kurzer had testified in the Grand Jury proceeding leading to the return of Indictment 73 Cr. 216. (Tr. 34-38, 46-47). As a result of Steinman's cooperation, a number of federal indictments, including the one at issue, were filed in March, 1974.

The Government also proved at the hearing that Kurzer's testimony before the Grand Jury had been limited to facts relating to the charges against Steinman in 73 Cr. 216 and had nothing to do with the charges in 73 Cr. 215. (Tr. 59, 61-62).*

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* At the hearing on the motion for reargument the Government also sought to establish that the Government had adequate evidence, other than Kurzer's testimony, with which to secure Indictment 73 Cr. 216, and accordingly Kurzer's testimony had not been necessary to procuring the only indictment to which his testimony had related. However, the trial judge *sua sponte* declined to permit the question to be answered. (Tr. 62).

The minutes of the testimony before the Grand Jury relating to the charges in 73 Cr. 216 are not part of the record but are, of course, available for the Court's inspection.

On November 13, 1975, Judge Lasker filed an opinion affirming the order of September 8, 1975 dismissing the indictment. In so doing, Judge Lasker ruled that Kurzer's information and testimony had "set in motion the train of events which ultimately resulted in his own indictment" and that "the immunized Kurzer testimony lead the Government to Steinman who in turn lead the Government to Kurzer."

ARGUMENT

The District Court Improperly Dismissed the Indictment.

The dismissal order entered below is erroneous for two reasons. First, the District Court explicitly and erroneously declined to take into consideration the undisputed testimony of Steinman and his attorney that Steinman's decision to cooperate was caused by the Government's discovery, entirely independent of any immunized testimony of Kurzer, that Steinman had been involved in a phony invoice scheme. Second, assuming, as we submit is plainly not the case, that the Government made indirect use of Kurzer's immunized testimony to secure his own indictment, Kurzer's lies to the Government, while immunized, about his knowledge of the very scheme for which he has now been indicted, lifted from him the cloak of immunity which had been granted to him as a *quid pro quo* for his truthful testimony.

A. Kurzer's immunized testimony was not the legal cause of Steinman's cooperation.

Conferring use immunity on a witness accords him neither a pardon nor amnesty. *Kastigar* v. *United States*, 406 U.S. 441, 461 (1972). Use immunity is intended to leave the witness in substantially the same position he would have been had he claimed his privilege; the witness is entitled to nothing more and nothing less. Accordingly,

while testimony compelled by use immunity cannot be used directly or indirectly against the witness, he may be prosecuted if the Government bears its heavy burden of proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, *supra*, 406 U.S. at 460; see *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79 n.18 (1964).*

Here, it was established, to be sure, that Kurzer provided information about certain of Steinman's activities which contributed to a March, 1973 Federal indictment of Steinman and others.** But this indictment did not *cause* Steinman to cooperate with the Government against Kurzer, and accordingly, Steinman's evidence against Kurzer was from a legitimate source independent of Kurzer's immunized testimony.

The undisputed testimony of Steinman and his attorney, Elkan Abramowitz, was that Steinman felt he had an effective defense to the charges contained in the March, 1973 indictment. Therefore, when Steinman was asked, after this indictment had been returned, whether he desired to cooperate with the Government, he declined, but advised the Government to recontact him if other matters were subsequently uncovered. The Government's investigation continued, and some months later, additional evidence was discovered, entirely independent of any in-

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* While the prosecution's burden is a heavy one because it not only must deny taint, but also affirmatively show an independent, legitimate source, *Kastigar* v. *United States*, *supra*, 406 U.S. at 460, the Government's affirmative showing need only be by a preponderance of the evidence. *United States* v. *Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974) (Wisdom, J.); *cf. Lego* v. *Twomey*, 404 U.S. 477 (1972); *United States* v. *Collins*, 462 F.2d 792, 793 n.2 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972).

** The Government's attempt to prove that Kunzer's testimony was unnecessary to the securing of this indictment was, as previously noted, frustrated by the District Court. See fn. on p. 10, *supra*.

formation provided by Kurzer, which revealed a scheme whereby Steinman received unreported income through a phony invoice scheme. Both Steinman and his attorney testified that when Steinman learned that the Government had discovered the invoice scheme, he recognized that he had no defense to the charges likely to flow from the discovery, and therefore agreed to cooperate. Both Steinman and Abramowitz testified that, when Steinman agreed to cooperate, he had no idea Kurzer had previously provided the Government with information.

The District Court's conclusion in its final opinion, after hearing all of this, was that, since Abramowitz testified that the March, 1973 indictment was disposed of a result of the plea negotiations between Steinman and the Government,* the indictment necessarily "played a role" in the negotiations. Therefore:

> "[w]e regard as artificial and unrealistic the government's attempt to compartmentalize the segments of the history of Steinman's prosecution. Whatever may have been Steinman's personal reaction to the relative strengths and weaknesses of the various charges in the indictment, nevertheless the immunized Kurzer testimony lead the Government to Steinman who in turn lead the Government to Kurzer."

The Court's conclusions are in error; for in no legally significant sense can it be said that Kurzer "led" the Government to Steinman. The record is clear that Steinman was not a witness whose identity would have been unknown to the Government but for Kurzer's testimony. Steinman had been one of the principal targets of the

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* In return for Steinman's agreement to cooperate and plead guilty to falsely subscribing an income tax return, the March 1973 indictment was *nolle prossed*.

Government's investigation long before Kurzer was ever approached by the Government. Indeed, the Government's overtures to Kurzer were made because of the Government's awareness that Kurzer was the accountant for a corporation in which Steinman had a significant interest.

Nor can it be said that Kurzer's testimony "led" to the March, 1973 indictment of Steinman which in turn "led" to Steinman's cooperation against Kurzer. Steinman had refused to cooperate after return of the March, 1973 indictment and agreed to cooperate only when the Government independently uncovered proof of the invoice scheme. Though Steinman's agreement to cooperate quite naturally disposed of all pending charges, including the March, 1973 indictment, and therefore the March, 1973 indictment clearly "played a part" in the negotiations, the undisputed testimony of Steinman and his attorney was that the uncovering of the invoice scheme was *the reason* Steinman decided to cooperate. The serious and potentially devastating charges flowing from the Government's discovery of that scheme, not the March, 1973 charges for which Steinman and his attorney were convinced they had a viable defense, were sufficient in and of themselves to cause Steinman to cooperate.

This Court's decision in *United States* v. *Cole*, 463 F.2d 163 (2d Cir. 1972) (Friendly, *C.J.*), *cert. denied*, 409 U.S. 942 (1973), clearly discloses the faults in the reasoning of the District Court. In *Cole*, conversations concerning illegal tax expense deductions had been overheard as a result of illegal eavesdropping by the FBI. Cole claimed that this illegal eavesdropping tainted his convictions for tax violations, because the prosecutor who requested the IRS saturation investigation resulting in the defendant's indictment had been aware of the contents of the intercepted conversations before requesting the investigation. The defendant's claim was re-

jected. This Court found that, while the intercepted conversations clearly "played a part" in the prosecutor's decision to request an investigation, the information contained in the conversations would not have been of sufficient importance alone to have the IRS conduct an investigation. Moreover, additional information independently obtained from an informant would have been sufficient in and of itself to order an investigation of the defendant. The Court stated:

> "While [the Assistant United States Attorney] candidly admitted that the personal expense deductions 'must have played some part' in his decision, it is clear both that he would never have sought—or obtained a saturation investigation on that ground alone and that he would have sought it—and in fact obtained it—on the [informant's] information above. *Conduct is not the legal cause of an event if the event would have occurred without it.* Prosser, Torts § 41 at 239 (1971 ed.)." 463 F.2d 173 (emphasis added).

See also *United States* v. *Falley*, 489 F.2d 33, 41 (2d Cir. 1973); *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).*

Applying *Cole's* reasoning here, it is clear that, while the March, 1973 indictment "played a part" in Steinman's agreement to cooperate, the discovery of the invoice scheme, not the March, 1973 indictment, was the "legal cause" of Steinman's cooperation. The March, 1973 indictment was not sufficient to induce Steinman's co-

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* Although *Cole* is a case in which the underlying violation was of the Fourth Amendment, the mode of analysis of causation which was adopted in that case is clearly applicable when the violation is of the Fifth Amendment. See *Harrison* v. *United States* 392 U.S. 219, 224-26 (1968); *Government of Virgin Islands* v. *Gereau, supra*, 502 F.2d at 927.

operation and the later discovery of the invoice scheme, entirely independent of any assistance from Kurzer, was sufficient in and of itself to induce his cooperation.*

In short, the rule in *Kastigar*, that use immunity should leave the witness *and the Government* in substantially the same position as if the witness had claimed his privilege, 406 U.S. at 458-59, was violated by the District Court. By applying an erroneous principle of causation, the District Court granted Kurzer the very pardon and amnesty which the Supreme Court recognized in *Kas-*

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* The District Court characterized the Government's proof as an "artificial and unrealistic attempt to compartmentalize the segments of the history of Steinman's prosecution." It is possible to read into that phrase the view that the District Court did not believe it possible to isolate in retrospect the factors which motivated Steinman to cooperate. This interpretation of the District Court's opinion is dispelled, however, by the next sentence in the Court's opinion in which the Court plainly expressed its view that an assessment of Steinman's motivations was simply irrelevant:

> "*Whatever may have been Steinman's personal reaction to the relative strengths and weaknesses of the various charges in the indictment,* nevertheless the immunized Kurzer testimony lead the government to Steinman who in turn lead the government to Kurzer." (emphasis supplied).

But, in any event, while we recognize that it is not always easy to determine which of the varied well-springs of human conduct may have been released to motivate a witness' cooperation, here the determination was aided by a number of factors. First, it was clear from Steinman's previous refusal to cooperate that the March, 1973 indictment was not of sufficient concern to him to induce his cooperation. Both his attorney and he agreed that they could effectively defend against that charge. The discovery of the invoice scheme, however, was plainly a different matter. For the offense on its face was far more serious, and both Steinman and his attorney agreed after consultation that as to that charge there was no defense and that a deal should promptly be arranged. In short, Steinman's pre-cooperation conduct and conversations with his attorney plainly demonstrated that discovery of the invoice scheme was, as he and his attorney testified, the "cause" of his cooperation.

tigar Congress had sought to withhold by enacting the use immunity statute.*

One final word on this issue is necessary. Kurzer argued below that, even if none of his immunized testimony related to the matters for which he was indicted, and even if all of the Government's evidence came from an

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* It is difficult in any event to see how the testimony of another witness can ever be considered the fruit of compelled testimony. After all it is only the introduction of a defendant's own testimony that is expressly proscribed by the Fifth Amendment's textual mandate that no person "shall be compelled in any criminal case to be a witness against himself"; compelling a suspect to disclose "real or physical" evidence is not violative of the privilege. *Schmerber* v. *California*, 384 U.S. 757, 764 (1966). As Judge Friendly has observed in his incisive essay on the *Miranda* decision, if the privilege "in Wigmore's phrases, guards against the employment of legal process 'to extract *from the person's own lips* an admission of guilt, which would thus take the place of other evidence' or to require him to produce documents or chattels wherein he assumes 'moral responsibility for truth telling,' inquiry designed to elicit unsworn answers leading to other culprits or to real evidence not in the suspect's possession but not themselves offered in evidence would not be covered; although a suspect's answers are indeed 'testimonial' insofar as they implicate him and would thus be banned as such, their use merely to find other evidence establishing his connection with the crime differs only by a shade from the permitted use for that purpose of his body or his blood." Friendly, *Benchmarks*, p. 280 (1967) (footnote omitted).

Since a strong argument can be made that the Fifth Amendment was not intended to protect against the use of any type of "fruits" of compelled testimony, it is all the more surprising that the testimony of a living witness "whose act of will, perception, memory and volition, interact to determine what testimony he will give", *Smith* v. *United States*, 324 F.2d 879, 881 (D.C. Cir. 1963) (Burger, *C.J.*), *cert. denied*, 377 U.S. 954 (1964), should have been found by the District Court to be encompassed by the privilege. The taint of compelled testimony must surely dissipate when the "lead" is a witness, who like Steinman, was already known to the Government, and whose testimony is clearly the fruit of "his own reflection and volition." *Brown* v. *United States*, 375 F.2d 310 (D.C. Cir. 1967), *cert. denied*, 388 U.S. 915 (1967).

independent source, his indictment nevertheless had to be dismissed, because it was impossible to determine how access to his immunized testimony might have influenced, even subconsciously, the mental processes of the prosecutors and agents who conducted this investigation. Kurzer, in essence, seeks to establish a rule that whenever a prosecutor has access to immunized testimony, the defendant is forever immune from prosecution, because the benefits derived from access can never be fully known. This is clearly not, and should not be, the law.

First, it is important to note that the cases on which Kurzer places principal reliance, *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973), and *United States* v. *Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974), *cert. denied*, 419 U.S. 872 (1974), both involved situations in which the prosecutor had access to immunized testimony which directly related to the charges for which the defendant was indicted. In those circumstances the uses of the testimony in planning strategy, or cross-examination, were obviously myriad. But here, Kurzer's immunized testimony never touched upon the acts for which he was indicted. Indeed, when asked about them, Kurzer specifically denied having any knowledge of them. The usefulness of this testimony was plainly *de minimis*.

Secondly, this Court's decisions in *United States* v. *Catalano*, 491 F.2d 268 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974) and *Goldberg* v. *United States*, 472 F.2d 513 (2d Cir. 1973), clearly point to rejection of the overbroad principle which Kurzer advocates. In *Catalano*, where the Federal prosecutor had access to prior immunized testimony, but where an independent source of the evidence was proved, this Court held that access to immunized testimony did not *ipso facto* prevent the Government from satisfying its burden under *Kastigar*. *Supra*, 491 F.2d at 272; see also *United States* v. *First Western State Bank of Minot, N.D.*, 491 F.2d 780 (8th Cir. 1974),

cert. denied, 419 U.S. 836 (1974). Similarly, in *Goldberg*, where this Court voiced concern about a grand jury voting an indictment against a witness who had testified before it under a grant of use immunity, there was no expression of concern about the prosecution presenting the case, absent the compelled testimony, to another grand jury, even though the prosecution, as here, would be fully aware of the compelled testimony. *Supra*, 472 F.2d at 516. See also *United States* v. *Dornau*, *supra*, 359 F. Supp. at 685 (court refused to dismiss Counts 1 through 30, despite prosecutor's awareness of immunized testimony which related to other Counts of the indictment).

The Court has recently observed that "[w]hen one proves a negative, it is difficult to be very specific about it; and we are loath to set impossibly burdensome standards." *United States* v. *Steinberg*, Dkt. No. 75-1150, Slip op. 6433, 6438 (2d Cir., Nov. 10, 1975). The burden Kurzer seeks to impose on the Government would most certainly be "impossibly burdensome"; it would also, we submit, be totally unwarranted.

B. Assuming arguendo that Kurzer's testimony caused Steinman to cooperate, Kurzer's lies, while immunized, concerning the matters for which he has been indicted, lifted the cloak of immunity.

Even assuming Kurzer's immunized testimony caused Steinman's cooperation, Kurzer's lies to the Government concerning the matters for which he has been indicted should not prevent the Government from using his immunized testimony against him.

Kurzer and the Government entered into a bargain. In return for Kurzer's truthful testimony concerning his own criminal activities, he was to be granted use immunity and the concomitant benefits which flow from cooperation,

i.e., the virtual certainty that, if he lived up to his end of the bargain, he would not be indicted and would not have to stand trial with respect to those matters candidly revealed.

Kurzer breached this bargain. While immunized, he categorically denied knowing anything about the scheme for which he has now been indicted. Kurzer, then, lied to the Government and violated the agreement under which he received immunity.

Having failed to honor the bargain, Kurzer should not be permitted to claim any of its benefits. See *United States* v. *Ciotti*, 469 F.2d 1204, 1207 (3d Cir. 1972), *vacated on other grounds*, 414 U.S. 1151 (1974); *cf. United States* v. *Nathan*, 476 F.2d 456, 459 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

> "'The immunity statute does not create an opportunity for a witness to effect an illusory exchange of real immunity in return for false testimony. There must be a bargain equivalent whereby the Government obtains the truth in exchange for its granting immunity." *United States* v. *Pappadio*, 235 F. Supp. 887, 890 (S.D.N.Y., 1964), *aff'd*, 346 F.2d 5 (2d Cir. 1965), *vacated on other grounds sub nom. Shillitani* v. *United States*, 384 U.S. 364 (1966).

Concededly, the Government's proposed use of Steinman's testimony does not fall precisely into any of the exceptions delineated in Title 18, United States Code, Section 6002. However, the teaching of this Court's decision in *United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974), is that "the listing of exceptions in immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration." 500 F.2d at 1345. Where, as

here, prohibiting the indirect use of Steinman's testimony would give Kurzer immunity in exchange for his withholding of evidence, it is inconceivable that Congress could have intended § 6002 to be used to achieve such an inequitable result.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

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Rose M. Weir being duly sworn, deposes and says that she is employed in the office of the Strike Force for the Southern District of New York.

That on the 6th day of February, 1976 she served two copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Rose M Weir

Sworn to before me this
6th day of February, 1976
William I Aronwald

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Commission Expires March 30, 1979